STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois,	)	
Complaint to suspend tariff changes submitted by Ameren Illinois and to investigate Ameren Illinois Rate MAPP pursuant to Sections 9-201, 9-250, and 16-108.5 of the Public Utilities Act;	)	Docket No. 13-0501
AMEREN ILLINOIS COMPANY d/b/a Ameren Illinois,	)	
Revision to its Formula Rate Structure and Protocols.	)	Docket No. 13-0517 (cons.)

BRIEF ON EXCEPTIONS REGARDING BIFURCATED ISSUES OF AMEREN ILLINOIS COMPANY

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ORAL ARGUMENT REQUESTED

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I. INTRODUCTION AND POSITION SUMMARY

The Energy Infrastructure and Modernization Act (EIMA) formula rate must operate in a "standardized" manner, and changes to the formula rate's "structure" cannot be made in annual update proceedings. The ALJPO, if adopted, would reduce the formula rate's "structure" to nothing more than two summary schedules, rendering the statutory term virtually meaningless. This would permit changes to the method for calculating the formula rate in every annual formula update case. As a result, the formula would no longer operate in a standardized manner. This is not a matter of semantics, nor is AIC making an effort to somehow "game" formula ratemaking. As explained below, the ALJPO provides the utility with the opportunity to make changes to the formula's calculations and methodology that would advance its financial interests. But, AIC seeks to correct the outcome of the ALJPO, since it would jeopardize one of the EIMA's core elements—the standardized annual update process.

Under EIMA, a participating utility commits to make significant investment in its electric infrastructure, and in return recovers its delivery services costs through a formula rate. The formula rate consists of detailed calculations and methodologies (the "formula") that use annual cost inputs to produce a delivery service revenue requirement. The Commission approves the initial formula rate (as it did for AIC in Docket 12-0001), and with it the formula. In AIC's case, the formula is set forth in detail in 12 Schedules and 11 Appendices. The formula is intended to remain fixed, or "standardized," from year to year. After the formula is approved, the cost inputs to the formula—the numbers to plug into the calculations in the Schedules and Appendices every year to produce the formula rate revenue requirement and resulting charges—are "updated annually with transparent information." 220 ILCS 5/16-108.5(c). Those cost inputs are reviewed by the Commission each year for prudence and reasonableness. 220 ILCS 5/16-108.5(b-5); (d)(3). This process is intended to "operate in a standardized manner." *Id.*

The EIMA makes clear (twice) that the Commission does not "have the authority in a[n] [update] proceeding … to consider or order *any changes to the structure* or protocols of the performance-based formula rate approved" pursuant to the EIMA. 220 ILCS 5/16-108.5(d)(1) (emphasis added). Both the Commission and the Fourth District Appellate Court have confirmed this limitation. So the question of what constitutes the formula rate "structure" is critical—as the answer to that question determines what, if any, of the formula calculations and methodologies (as opposed to the cost inputs) can be changed every year in the annual update proceeding.

The ALJPO adopts Staff's position that only two summary schedules of the 23 Schedules and Appendices are the formula rate "structure." In doing so, the ALJPO incorrectly assumes that the formula rate tariff and the formula rate structure are the same thing. If left to stand, this will allow changes to any of the methodologies and calculations in the other 21 Schedules and Appendices in any annual update proceeding. So AIC could, in its pending annual update filing, propose changes to the Schedules and Appendices to, among other changes:

- Increase rate base by the amount of budget payment plan balances, which would permit the utility a greater return on its investment;
- Alter the source for the return on equity (ROE) collar calculation to increase the rate base component, which, if adopted, could decrease the ROE percentage used to determine if the ROE collar is exceeded, and thus make it easier for the utility to avoid collar adjustments; or
- Remove ADIT from the calculation of projected plant, which would have the effect of increasing the utility's rate base.

Although these types of changes would appear to benefit the utility, their proposal in an annual update is contrary to the EIMA's requirement that the formula rate operate in a "standardized" manner. 220 ILCS 5/16-108.5(c).

Because of requirement of standardization, it has been AIC's belief, and Commission practice, that such changes to the formula calculations and methodology required approval in a

separate Section 9-201 proceeding. The ALJPO, however, would allow any and all parties to propose changes to the 21 Schedules and Appendices not part of the ALJPO's definition of "structure" in the annual update. The "standardized" formula would deteriorate—its methodology and calculations could change, perhaps dramatically, from year to year. Further inconsistencies would arise with the need to implement changes authorized in one year's update case for the reconciliation of rates in effect in the prior year.

The ALJPO's definition of "structure" would render the provision barring the Commission from considering "any changes to the structure or protocols of the performance-based formula rate" in an update proceeding virtually meaningless. *See* 220 ILCS 5/16-108.5(d)(3). Under the ALJPO's interpretation, changes to anything, save two summary Schedules, could be considered in an update proceeding, leaving little point in EIMA's prohibition on considering changes to the "structure" in an annual update.

A more reasonable interpretation is that the "structure" includes all the calculations in the 23 Schedules and Appendices—the calculations that make up the formula. This does not mean that these calculations can never be changed; rather, the calculations can be changed in a separate Section 9-201 filing, as the EIMA allows.

II. ARGUMENT

Exception 1: ALJPO SECTION II.B "Should 'formula rate structure' be defined to mean the approved tariff set forth in AIC's tariffs as Rate 21 MAP-P, Tariff Sheet Nos. 16 – 16.013?" Subsection 5, "Commission Conclusion" (ALJPO pp. 18-19), and ALJPO SECTION II.D "Should changes to only Schedules FR A-1 and FR A-1 REC require Commission approval through a Section 9-201 filing?" Subsection 5, "Commission Conclusion" (ALJPO p. 36).

A. The ALJPO, if adopted, would prevent the formula from working in a standardized manner.

Formula ratemaking under EIMA streamlines the traditional ratemaking process by establishing a set method for calculating a rate (the formula), and then applying that same

calculation to new cost data annually over the course of several years. Thus, under the formula, the utility calculates rates in the same, standardized manner in each year: EIMA requires the Commission to establish this formula rate "with sufficient specificity to operate in a standardized manner and be updated annually with transparent information that reflects the utility's actual costs." 220 ILCS 5/16-108.5(c). In each year after the "standardized" ratemaking formula was established, the utility must provide the Commission with updated values for the cost inputs to the formula. 220 ILCS 5/16-108.5(d).

However, to maintain separation between the "standardized" formula and the annually-variable cost inputs to the formula, the EIMA provides, not once, but twice, that "[t]he Commission shall not … have the authority [in an annual update proceeding] to consider or order any changes to the structure or protocols of the performance-based formula rate." 220 ILCS 5/16-108/5(d)(3); *see also* 220 ILCS 5/16-108.5(c) (all "changes to the performance-based formula rate structure or protocols shall be made as set forth in Section 9-201 of this Act"). The Commission has itself reiterated "the Act specifically prohibits the Commission from modifying the formula rate itself, which is intended to protect both [the utility] and ratepayers." *Ameren Ill. Co.*, Docket 12-0293, Order, p. 103 (Dec. 5, 2012). And the Fourth District Appellate Court has confirmed the distinction as well: "the plain, unambiguous language of subsections (d)(1) and (d)(3) prohibited the Commission from reconsidering the initial performance-based formula rate during the first annual reconciliation proceeding at issue [in an update]." *Ameren Ill. Co. v. Ill. Comm. Comm'n*, 2013 IL App (4th) 121008 ¶ 45.

The distinction between "structure" and cost inputs is not an obscure consideration. Annual changes to the Schedules and Appendices would impose practical difficulties in formula ratemaking proceedings. Formula ratemaking necessarily considers three scenarios: (i) the

revenue requirement in effect during the "applicable calendar year"; (ii) the revenue requirement that "would have been" in effect "had the actual cost information for the applicable calendar year been available at the filing date"; and (iii) the revenue requirement for the upcoming year, which includes "projected plant additions and correspondingly updated depreciation reserve and expense." 220 ILCS 5/16-108.5(c)(6). But if the formula by which the revenue requirement is calculated is susceptible to change after it is initially approved, any change would need to be reflected at least in scenarios (ii) and (iii). Fluctuations in the formula will add difficulty to the Commission's task of considering three revenue requirement scenarios, which occurred in two different time periods, and which, according to the ALJPO, could be calculated using three different formulas. This difficulty and confusion is unnecessary, and can be easily avoided by ensuring that the calculations contained on the formula rate Schedules and Appendices remain the same from year to year.

Maintaining the distinction between "structure" and cost inputs does not prevent the Commission from modifying the method of calculating the formula rate. The Commission may make changes to the standardized ratemaking calculation methodology at any time, in a proceeding pursuant to Section 9-201. 220 ILCS 5/16-108.5(d)(3). EIMA's prohibition on changing the "structure or protocols" of the formula rate merely ensures that the formula ratemaking process "operate[s] in a standardized manner" from year to year. 220 ILCS 5/16-108.5(c).

Adoption of the ALJPO, however, would cause the formula to become anything but standardized. By limiting the "structure" of the formula rate to two summary Schedules (out of a total of 23 Schedules and Appendices containing numerous detailed calculations that produce the formula rate (*see* AIC Ex. 2.4)), the ALJPO would allow AIC or any other party to an annual

update proceeding to propose modifications to any of the calculations contained on the Schedules and Appendices. Staff agrees that, under its proposed definition of "structure," which the ALJPO adopts, numerous and varied changes to the formula calculations and methodologies could be proposed in every annual update. (Tr. 107-10; AIC Init. Br. on Bif. Issues at 11.) Not only could these proposals be made, but without the need for a separate Section 9-201 proceeding, they would be easy to make. Thus, the utility could:

- Propose to add a category or type of expense that was not previously included on its formula rate Schedules and Appendices. Under AIC's current formula, for example, Budget Payment Plan Balances are not reflected in rate base. However, Budget Payment Plan Balances are summarized on Part 285, Schedule B-14. In AIC's most recent formula rate update case, Docket 14-0317, Part 285 Schedule B-14 indicates that AIC's customers owe the Company $10,315,106. *See Ameren Ill. Co.*, Docket 14-0317, Schedule B-14 (col. E, l. 12). In AIC's most recent gas rate case, the Commission approved a rate base adjustment for Budget Payment Plan Balances. *Ameren Ill. Co.*, Docket 13-0192, Order, p. 3 (Dec. 18, 2013). AIC has not proposed an adjustment in the pending formula rate update proceeding because no such adjustment was included in the Schedules and Appendices approved by the Commission in Docket 12-0001. However, if the Commission adopts the ALJPO's definition of "formula rate structure," which would allow changes to all Schedules and Appendices other than FR A-1 and FR A-1 REC, AIC could propose an adjustment in Docket 14-0317 to increase its rate base by the $10,315,106 in Budget Payment Plan Balances.

- Seek in an annual update proceeding to alter the source of the rate base component for the ROE collar calculation, which appears on Schedule FR A-3. If adopted, this type of proposal would increase the rate base amount used as the denominator in the calculation, which would in turn decrease the ROE percentage determined with that calculation. This ROE percentage is used to determine if the ROE collar is exceeded, so the new methodology would lessen the likelihood of ROE collar adjustments. (Tr. 118-20.)

- Propose to eliminate the deduction of ADIT from projected plant, thereby increasing rate base. (ATXI Ex. 2.4; Tr. 110, 116-17; AIC Init. Br. on Bif. Issues at 15.)

- Propose to "gross up" the weighted average cost of capital when calculating the interest amount on reconciliation balances, as ComEd did in Docket 13-0553, to recognize the added tax costs associated with the equity component of the capital financing that portion of the reconciliation balance.

- Propose other changes to calculations of items that impact rate base balance like customer advances or materials and supplies, to increase rate base.

Parties could propose more extreme changes as well. The method for calculating the ROE, for example, does not appear in AIC's Schedules FR A-1 or FR A-1 REC, which the ALJPO defines as the "structure." (*See* AIC Br. on Bif. Issues at 5.) Instead, these calculations appear on Schedules D-1 and A-3, respectively. (*Id.*) Staff admitted that, under its definition of "structure," Schedule FR D-1 "would not be considered part of the formula rate structure and protocols." (*Id.*) Therefore, if the Commission ratifies the ALJPO, it would be easy to propose adjusting the method for calculating its ROE in any annual update proceeding, by simply adding a line item containing any number of basis points. (*Id.*) This cannot be the outcome the legislature intended when it stated that the formula rate process should operate in a "standardized manner." 220 ILCS 5/16-108.5(c).

B. The ALJPO's definition of formula rate "structure" would render the term "structure" virtually meaningless.

The ALJPO's conclusion by necessity produces an interpretation of the statutory term "formula rate structure," but the ALJPO does not explain what statutory language it relies on. Nor does it mention a recent decision of the Illinois Appellate Court, which addresses the very question of what constitutes the structure. *See Ameren Ill. Co. v. Ill. Comm. Comm'n*, 2013 IL App (4th), 121008 (hereinafter, AIC Appellate Decision). The ALJPO defines the formula rate's "structure" to include only two pages of Schedules, which contain high-level summary results of calculations that are actually detailed over the course of many more pages in the following 10

Schedules and 11 Appendices.[1] The ALJPO's definition of "structure" is so narrow that, if it is adopted, the "structure" will contain almost no calculations. This would render the term "structure" and the EIMA's requirement that changes to the "structure" be made in a separate Section 9-201 proceeding virtually meaningless. But an agency interpreting a statute has an "obligation to avoid a construction which renders a part of the statute superfluous or redundant, and instead presume that each part of the statute has meaning." *People v. Baskerville*, 2012 IL 111056 ¶ 25 (noting that it would be "superfluous" for the legislature to include two provisions in a statute that meant the same thing). Since the ALJPO's definition of "structure" would render it meaningless, the Commission should not adopt it.

C. In fact, formula rates *have already been* successfully operating in a standardized manner under AIC's definition of "structure".

The ALJPO states that the Commission has "processed three annual update and reconciliation proceedings for both AIC and ComEd and the definition of 'formula rate structure' has served the process well." (ALJPO at 19.)[2] This is true as far as it goes—*but the definition of "formula rate structure" that has served the process so well is AIC's definition, not Staff's*. The de facto rule has been AIC's definition of formula rate "structure," in which changes to any Schedules and Appendices have been considered changes to the formula rate structure and addressed in a proceeding separate from an annual update proceeding. (AIC Ex. 6.0, pp. 5-6; AIC Reply Br. on Bif. Issues at 10.) In 2014, the Commission will issue orders in the third annual update proceedings of each of the participating utilities under EIMA. In addition to those

[1] In other formula-ratemaking states, the standardized formula also includes much more than two summary pages. *See, e.g., In re Atmos Energy*, Docket 34734, Order, 2011 Ga. PUC LEXIS 317, 295 P.U.R. 4th 174 (adopting Atmos Energy's "Georgia Rate Adjustment Mechanism," in which a single ratemaking calculation method described in eleven Schedules is used in connection with an annual update of the utility's costs to derive rates).

[2] The ALJPO is incorrect regarding the number of annual update proceedings. AIC and ComEd each filed their third annual update proceeding in 2014. To date, the Commission has resolved an initial formula rate proceeding for each utility, and only *two* annual update proceedings for each utility, one in 2012 and one in 2013.

six proceedings, the Commission has issued orders in at least six other cases related to the formula rate. Throughout those cases, the Commission has maintained strict separation between proceedings in which it considers changes to the "standardized" ratemaking calculation—the formula's structure—and proceedings in which it considers the prudence of the utilities' annual cost inputs.

For example, AIC made its initial formula rate filing in Docket 12-0001, and the Commission approved a revenue requirement calculated using the calculations and methodology set forth on AIC's formula rate Schedules and Appendices. *Ameren Ill. Co.*, Docket 12-0001, Order (Sept. 19, 2012). In each subsequent year, AIC has filed "updated cost inputs to the performance-based formula rate," in accordance with the statute, 220 ILCS 5/16-108.5(d), and the Commission has approved new rates by inputting the prudently-incurred costs into the same Schedules and Appendices it approved in Docket 12-0001 (as subsequently modified in Section 9-201 proceedings). *Ameren Ill. Co.*, Docket 12-0293, Order, p. 103 (Dec. 5, 2012). The Commission has refused to consider changes to the method of calculating formula rates in an update, recognizing that "the Act specifically prohibits the Commission from modifying the formula rate itself, which is intended to protect both [the utility] and ratepayers." *Id.*

Meanwhile, parties' proposals to alter the method and calculations by which formula rates are calculated are consistently considered outside of annual update proceedings. For example, in Docket 12-0455, ComEd initiated a proceeding pursuant to Section 9-201 in which it asked the Commission to approve a change to correct an error in the method by which the return on equity collar was adjusted for taxes. *Commonwealth Edison Co.*, Docket 12-0455, Petition, pp. 1-2. As ComEd noted, "the correction [was] substantive, in the sense that it affects the calculation." *Id.* at 2. The Commission approved this correction. *Commonwealth Edison*,

Docket 12-0455, Special Permission Letter (Aug. 15, 2012). ComEd later initiated a similar proceeding pursuant to Section 9-201 in which it asked the Commission to consider alterations to its Schedules FR B-1, FR B-2, and App 3. *Commonwealth Edison*, Docket 13-0339, Petition, pp. 3-4. In its order in that case, the Commission noted that ComEd had initiated the Section 9-201 proceeding because EIMA provides that "changes to the performance-based formula rate structure and protocols shall be made as set forth in Section 9-201." *Commonwealth Edison*, Docket 13-0339, Order, p. 1 (June 26, 2013). The Commission approved each of the alterations ComEd proposed. *Id.* at 2-3.

Likewise, the Attorney General has initiated two proceedings, outside of annual update proceedings, in which it has asked the Commission to consider changes to the manner in which AIC's and ComEd's formula rates are calculated. *See People v. Ameren Ill. Co.*, Docket 13-0501; *People v. Commonwealth Edison*, Docket 13-0511. Similarly, this proceeding was originally initiated to consider adjustments to AIC's formula rate. *See Ameren Ill. Co.*, Docket 13-0517.

Thus, the parties and the Commission have been operating under the understanding that changes to the manner in which the formula rate is calculated cannot be considered within an annual update proceeding. But the ALJPO would allow parties to propose, and force the Commission to consider, changes to any and all calculations displayed on AIC's Schedules FR A-2, FR A-3, FR A-4, FR B-1, FR C-1, FR C-2, FR C-3, FR C-4, FR D-1, FR D-2, and Appendices 1 through 11, in each and every annual update proceeding.

D. The ALJPO's definition of "structure" ignores both the EIMA's language and the Appellate Court's interpretation of that language.

It is fundamental that, when interpreting a statute, the "inquiry must always begin with the language of the statute, which is the surest and most reliable indicator of legislative intent."

People v. Marshall, 242 Ill. 2d 285, 292 (2011). But the ALJPO's conclusion does not analyze, or even cite, the language of the statute. The ALJPO's failure to consider the statutory language leads it to conflate the statutory term "structure" with the statutory term "tariff." (*See* AIC Init. Br. on Bif. Issues at 7-8.) Furthermore, "an agency is bound by an uncontested judicial interpretation of a statute." *Bd. of Ed. v. Ill. Ed. Labor Rels. Bd.*, 183 Ill. App. 3d 972, 977 (4th Dist. 1989). But the ALJPO also ignores the Fourth District Appellate Court's recent opinion interpreting the term "structure." Consideration of the statutory language and the Appellate Court's interpretation of that language require rejection of the ALJPO's conclusion.

1. The ALJPO improperly conflates the formula rate "structure" with the "tariff."

Throughout this proceeding, Staff argued that only Schedules FR A-1 and FR A-1 REC could be considered the "structure" because the Commission chose to include only those schedules in AIC's formula rate tariff. (*See, e.g.*, Staff Init. Br. 8.) The ALJPO appears to agree with this rationale, noting "the Commission has previously approved the format for these schedules," presumably by including them in the tariff. (ALJPO at 19.)

However, the "tariff" and the "structure" are not the same thing. It is "a basic rule of statutory construction that, by employing certain language in one instance and wholly different language in another, the legislature indicates that different results were intended." *In re Marriage of O'Brien*, 2011 IL 109039 ¶ 95, citing *In re K.C.,* 186 Ill. 2d 542, 549-50 (1990) (internal quotation omitted). The word "tariff" has long been a fixture of utility ratemaking, *see, e.g. State Public Utilities Comm'n v. Terminal R.R. Ass'n*, 281 Ill. 181, 183 (1917), and the legislature must be assumed to have understood the meaning of the term "tariff" when drafting the EIMA. *Metro. Life Ins. Co. v. Hamer*, 2013 IL 114234, ¶ 20 citing *People v. Maggette*, 195 Ill. 2d 336, 349 (2001) ("Where a term is undefined, we presume that the legislature intended the

term to have its popularly understood meaning."). The words "formula rate structure and protocols," however, appear for the first time in the EIMA. Use of this new and different language instead of the old, established term "tariff," means that the term "structure and protocols" does not necessarily mean "tariff." The Commission must adhere to the Act, and therefore cannot adopt an interpretation of the Act that would conflate terms the legislature clearly intended to distinguish. Any body that undertakes statutory interpretation has an "obligation to avoid a construction which renders a part of the statute superfluous or redundant, and instead presume that each part of the statute has meaning." *People v. Baskerville*, 2012 IL 111056, ¶ 25 (2012) (holding that, when a statute prohibited "resist[ing]" and "obstruct[ing]" police officers, the terms "resisting" and "obstructing" necessarily had different meanings). The ALJPO interprets the term "formula rate structure" to have the same meaning as the term "formula rate tariff." This construction renders the legislature's inclusion of the two terms superfluous or redundant, and should not be adopted by the Commission.

2. The ALJPO is inconsistent with the Appellate Decision.

Additional insight into the meaning of the term "structure" is available in the form of a recent decision of the Fourth District Appellate Court. *Ameren Ill. Co. v. Ill. Comm. Comm'n*, 2013 IL App (4th), 121008, ¶ 45. The Appellate Decision interprets the Act's prohibition against considering alterations to the "structure and protocols" of the formula rate in an annual update proceeding. *Id.* Yet the ALJPO fails to cite to, or even mention, the Appellate Decision. (AIC Init. Br. on Bif. Issues at 5-6; AIC Reply Br. on Bif. Issues at 6-7.) This is particularly problematic because the ALJPO's conclusion regarding the definition of the term "structure" conflicts with the Court's interpretation of the term.

The Appellate Decision ruled the language of Sections 16-108.5(d)(1) and (d)(3) made clear that EIMA "prohibited the Commission from reconsidering the initial performance-based

formula rate during the first annual reconciliation proceeding." *Id.* This ruling is instructive here because the component of the formula rate that the Court held could not be reconsidered in an annual update proceeding was a rate base adjustment for vacation accrual, an item not found in FR A-1 or FR A-1 REC (or even as a line item on the other Schedules and Appendices). (Tr. 112-13.) The finding that the vacation accrual adjustment was part of the "initial performance-based formula rate," which could not be changed because of the EIMA's requirement that "[t]he Commission shall not … have the authority in a proceeding under this subsection (d) to consider or order any changes to the structure or protocols of the performance-based formula rate approved pursuant to subsection (c) of this Section," confirms that the concept of "structure" includes far more than merely Schedules FR A-1 and FR A-1 REC. Appellate Decision at ¶ 45.

Staff admitted that, under its proposal in this case, in a future annual update proceeding, a party could propose to reverse the deduction for the accrued vacation reserve (which would have the effect of increasing rate base) and the Commission would have to consider that proposal. (Tr. 115.) This is plainly contrary to the Appellate Decision's holding that the accrued vacation reserve could *not* be reconsidered in a reconciliation. Yet this is the conclusion that the ALJPO adopts. The Commission should not ignore the instructive and binding holdings of the Appellate Court.

E. The ALJPO erroneously concludes that it must adopt Staff's proposal to avoid "limiting of the Commission's ability to take reasonable actions in future annual rate update and reconciliation proceedings."

The entirety of the ALJPO's reasoning in reaching its conclusion on the definition of "structure" is: "the proposed definition of 'formula rate structure' by AIC is potentially too limiting of the Commission's ability to take reasonable actions in future annual rate update and reconciliation proceedings … and to expand the 'formula rate structure' definition beyond [Schedules FR A-1 and FR A-1 REC] constitutes too restrictive a view of Commission authority

under EIMA." (ALJPO at 18-19.) The ALJPO does not explain what "reasonable actions" might be limited, or how those actions might be limited. Instead, this conclusion confuses the question of *what procedure* the Commission must use to consider modifications to the method by which the formula rate is calculated with the question *whether* the modifications may be considered at all.

No party disputes that the Commission may review the prudence and reasonableness of the cost inputs to the formula, and may adjust or disallow certain costs on prudence and reasonableness grounds, during each and every annual update proceeding (*i.e.*, by reducing the value of an input, perhaps even to zero). *See* 220 ILCS 5/16-108.5(b-5) (the Commission may investigate "the prudence and reasonableness of the *expenditures* made under the infrastructure investment program"); 220 ILCS 5/16-108.5(c)(1) (the formula rate shall recover "the utility's *costs* that are prudently incurred and reasonable in amount"); 220 ILCS 5/16-108.5(c)(6) (the Commission shall review the utility's annual update filing for "the prudence and reasonableness of the *costs* incurred by the utility"); 220 ILCS 5/16-108.5(d)(3) (the Commission may "enter upon a hearing concerning the prudence and reasonableness of the *costs* incurred by the utility") (emphases added).

Indeed, the Commission has exercised its authority to make prudence and reasonableness adjustments to a wide variety of AIC's costs in each of the three AIC formula rate cases so far, while refraining from making changes to the method of calculation. *See, e.g., Ameren Ill. Co.*, Docket 13-0301, Order, pp. 59-61 (making a variety of adjustments to AIC's Account 588 expense); *Id.* at 137-38 (approving a downward adjustment to AIC's long-term debt balance); *Ameren Ill. Co.*, Docket 12-0293, Order, pp. 38-39 (approving an adjustment to the lag days applied to pass-through taxes).

Similarly, no party to this proceeding disputes that the Commission may consider any change to the method by which the formula rate is calculated in a Section 9-201 proceeding, or in an investigative proceeding initiated by the Commission itself. As EIMA provides, "Subsequent changes to the performance-based formula rate structure or protocols shall be made as set forth in Section 9-201 of this Act, but nothing in this subsection (c) is intended to limit the Commission's authority under Article IX and other provisions of this Act to initiate an investigation of a participating utility's performance-based formula rate tariff, provided that any such changes shall be consistent with paragraphs (1) through (6) of this subsection (c)." 220 ILCS 16-108.5(c)(6).

Thus, the EIMA has procedures that allow the Commission to consider changes to each of the two components of the formula ratemaking process: the cost inputs, and the calculations and methodology of the formula. There is no element of the formula ratemaking process that is shielded from Commission review by defining the "structure" to include all the formula rate Schedules and Appendices used to combine cost inputs to calculate a final rate. And the ALJPO does not identify any element of formula ratemaking that would be placed beyond the Commission's reach.

Defining the "structure" to include all formula rate Schedules and Appendices would merely ensure that the changes to the formula itself be considered separately, in accordance with the EIMA. This is important because a utility's cost inputs will vary each year, and so should be considered on a yearly basis, while the method of calculating the formula rate is intended to "operate in a standardized manner" throughout the formula ratemaking process, and so should not be constantly amended. *See* 220 ILCS 5/16-108.5(c).

F. The ALJPO incorrectly characterizes the Commission's Order in Docket 12-0001.

The ALJPO incorrectly states that the Commission "previously rejected the exact same proposal by AIC in Docket 12-0001" and that "AIC's position in this proceeding constitutes an improper collateral attack on the Commission's previous decision." (ALJPO at 19.)[3] But in Docket 12-0001, the Commission determined what schedules to include in the formula rate *tariff*, not what the "*structure*" of the formula rate was.

Although the ALJPO does not actually describe the argument in Docket 12-0001 to which it refers, nor cite the Order in Docket 12-0001, AIC interprets this statement to refer to the portion of that Order titled "Schedules to be Included in Rate MAP-P/Tariff Complexity." *Ameren Ill. Co.*, Docket 12-0001, Order, pp. 144-51 (Sept. 19, 2012). In this portion of the Docket 12-0001 Order, the Commission considered whether to limit the schedules included in AIC's *tariff* to Schedules FR A-1 and FR A-1 REC. *See Ameren Ill. Co.*, Docket 12-0001, Order, p. 151, citing *Commonwealth Edison Co.*, Docket 11-0721, Order, p. 153 (May 29, 2012). The Docket 12-0001 Order summarizes AIC's position in that case as opposing other parties' "proposals to exclude portions of its proposed Rate MAP-P [from the tariff], arguing among other things that excluding details does not make the tariff less complicated and that consumers are free to ignore the details of the tariff if they so choose." *Id.* at 151. In Docket 12-0001, the Commission did not make any reference to the "structure or protocols," or suggest that it intended its decision to be relevant to the scope of future annual update proceedings.

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[3] The doctrine of collateral estoppel precludes a party from relitigating the same fact or issue that was previously decided in a valid, final judgment. *Midland Hotel Corp. v. Director of Empl. Sec*., 282 Ill. App. 3d 312, 315-16 (1st Dist. 1996). In order for the doctrine of collateral estoppel to apply, and render an argument improper: "the issue previously adjudicated [must be] identical to the question presented in the subsequent action." *Oshana v. FCL Builders, Inc*., 2013 IL App (1st) 120851, ¶ 16 (noting two additional factors not relevant here, that a final judgment on the merits exists in the prior case; and the party against whom estoppel is directed was a party to the prior litigation). No issue determined by the Commission in Docket 12-0001 was identical to the issues to be decided here.

The parties' arguments and the Commission's conclusion in Docket 12-0001 focused on whether AIC's customers should be able to review all of the formula rate schedules within the tariff. The Commission was not asked in Docket 12-0001 to define the term "formula rate structure," as they have been asked to do here. Therefore, the issues determined by the Commission in Docket 12-0001 are not identical to, or even similar to, those to be determined here.

G. If the Commission adopts AIC's Exception 1, it should also alter the ALJPO's conclusion regarding the changes that must be approved in a Section 9-201 proceeding.

In response to the question of what changes require Commission approval in a Section 9-201 proceeding, Part II.D of the ALJPO concludes "that it can not reach a conclusion on this question at this time," and that the Commission will consider the question "on a case by case basis as it arises." (ALJPO at 36.) But, if the Commission determines, as it should, that Staff's proposal should be rejected and that "structure" includes all of AIC's formula rate Schedules and Appendices, it cannot adopt this case-by-case approach. The EIMA provides that "the Commission shall not … have authority in [an annual update proceeding] to *consider or order* any changes to the structure or protocols of the performance-based formula rate." 220 ILCS 5/16-108.5(d)(3) (emphasis added). Thus, if the Commission determines that all of the formula rate Schedules and Appendices constitute the "structure," it may not "consider" changes to any of the formula rate Schedules or Appendices in an annual update proceeding. Therefore, if the Commission defines "structure" to include anything more than FR A-1 and FR A-1 REC, it must modify the outcome of Part II.D of the ALJPO to comply with its findings. Appropriate exceptions language is provided in Appendix A.

Exception 2: ALJPO SECTION II.A "Should the issues raised by Staff be deferred for consideration in the ordered formula rate rulemaking?" Subsection 5, "Commission Conclusion" (ALJPO pp. 5-6).

The Commission can resolve this proceeding by simply rejecting the ALJPO's definition of "structure" and continuing under its existing practice of considering the "formula rate structure" to include all formula rate Schedules and Appendices. That outcome is reflected in the language of Exception 2, Alternative 1. But if the Commission does see any merit in the definition of "formula rate structure" advanced by Staff, and adopted by the ALJPO, it must consider these issues within the formula rate rulemaking proceeding. The ALJPO states that "[t]o wait for the completion of a formula rate rulemaking . . . no longer seems prudent. Consideration of Staff's concerns in this proceeding is timely and proper." (ALJPO 5.) The ALJPO concludes that the "outcome of this proceeding will not be automatically applied to ComEd." *Id.* But this is wrong, and a rulemaking would be required.

All parties to this proceeding, including Staff, agreed that the outcome of the proceeding would affect ComEd as well as AIC. (*See* Ameren Cross Ex. 1SH (response to data request AIC-Staff 1.36); CUB Init. Br. 12.) In fact, Staff has stated in pleadings in Docket 14-0316, a ComEd Section 9-201 filing to change certain aspects of the formula rate structure, that the issues in this case are relevant there as well. *Commonwealth Edison Co.*, Docket 14-0316, Staff Mtn. for Leave to File Exceptions to ComEd's Draft Order, for Entry of an Interim Order, and to Reopen the Record (filed May 16, 2014). The ALJPO agrees as well. (ALJPO at 6 (noting that, as the issues were contemplated by Staff, "the outcome would be applicable to both AIC and ComEd"). And as the ALJPO recognizes, Section 10-101 requires that "[a]ny proceeding intended to lead to the establishment of policies, practices, rules or programs applicable to more than one utility may, in the Commission's discretion, be conducted pursuant to either rulemaking or contested case provisions, *provided such choice is clearly indicated at the beginning of such*

proceeding and subsequently adhered to." 220 ILCS 5/10-101 (emphasis added).

But, as the ALJPO also acknowledged, at the beginning of this proceeding, "no indication was given that the outcome would be applicable to both AIC and ComEd. Had such an outcome been contemplated at the outset, ComEd may have chosen to participate." (ALJPO 6.) Thus, a rulemaking proceeding is the only forum in which the Commission might appropriately adopt the proposals advanced by Staff.

The ALJPO attempts to avoid this conclusion by stating, "the outcome of this proceeding will not be automatically applied to ComEd," and that the Commission may proceed in "considering Staff's proposals as they relate to AIC." (*Id.*) But the ALJPO's conclusions regarding the definition of the "formula rate structure" are based on an interpretation of the Commission's authority under EIMA. (ALJPO at 18-19.) Whatever interpretation of its authority the Commission makes, that interpretation will necessarily apply to ComEd and all entities regulated under EIMA. The Commission cannot interpret the EIMA differently with respect to AIC and ComEd. (*Id.* at 18.) Otherwise, the Commission would be acting arbitrarily, which it cannot do. *See Greer v. Illinois Hous. Dev. Auth.,* 122 Ill. 2d 462 (1988) ("While an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary. The standard is one of rationality.") *and City of Urbana v. Andrew N.B.,* 211 Ill. 2d 456, 466 (2004) ("Equal protection guarantees that similarly situated individuals will be treated similarly, unless the government demonstrates an appropriate reason to do otherwise. …[W]e employ so-called rational basis scrutiny and ask only whether the challenged classification bears a rational relation to a legitimate purpose.").

Because the ALJPO's conclusion regarding the definition of "formula rate structure" is based only on its interpretation of the Commission's authority under EIMA, and not on any facts

specific to AIC, the ALJPO's conclusion that the Commission's order in this case will not apply to ComEd is disingenuous. The ALJPO's conclusion in this regard must be rejected. This outcome is reflected in the language of Exception 2, Alternative 1.

III. REQUEST FOR ORAL ARGUMENT

AIC respectfully requests that the Commission set this matter for oral argument, as authorized under 220 ILCS 5/9-201(c) and 83 Ill. Adm. Code § 200.850. Section 9-201 provides that a party to a "proceeding initiated under this Section" who has "submitted a post-hearing brief must be given the opportunity to present oral argument, if requested no later than the date for filing exceptions, on the propriety of any proposed rate or other charge, classification, contract, practice, rule, or regulation." 220 ILCS 5/9-201(c).

In this proceeding, which was initiated pursuant to Section 9-201, the issues presented for the Commission's determination are of importance both to AIC and potentially all participating utilities. The Commission routinely grants oral argument in proceedings of the magnitude of this one. The Commission would benefit from oral argument on these matters, and it would provide the Commission with an additional opportunity to seek input from the parties.

IV. CONCLUSION

For the reasons stated, AIC requests that the exceptions language in Appendix A be adopted.

Dated: May 23, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, certify that on May 23, 2014, I caused a copy of the foregoing *Brief on Exceptions Regarding Bifurcated Issues of Ameren Illinois Company* to be served by electronic mail to the individuals on the Commission's Service List for Docket Nos. 13-0501/13-0517 (cons.).

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